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Before the Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
@ Communications, Inc.	)	**CC Docket No. 02-4**
Petition for Declaratory Ruling	)	

@ COMMUNICATIONS' REPLY COMMENTS

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MAR - 7 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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SUMMARY

The commenting competitive carriers assert the current rules are clear and the Commission must enforce the current rules. The incumbent telephone companies, on the other hand, claim the rules do not mean what they say. The ILECs inconsistently assert the Commission should decide the issue in the *Compensation NPRM* and that this matter should be resolved at the state level. On the merits, the incumbents complain that they should not have to bear cost responsibility for facilities that carry traffic they originate.

@ Communications brought this matter because Sprint was relying on North Carolina Commission decisions in arbitrations relating to new, replacement agreements to avoid its clear obligations under a valid and subsisting agreement that correctly reflects this Commission's rules. The North Carolina Commission ordered abatement of a state-level proceeding between @ Communications and Sprint for the express purpose of securing this Declaratory Ruling. Sprint's suggestion that the Enforcement Bureau believed @ Communications' position has no merit is belied by the Bureau's letter indicating its decision to not accept the matter for accelerated dispute resolution. The letter decision expressly states the decision was not a determination of any of the merits.

The current rules require ILECs to bear the cost of delivering traffic they originate to the point of interconnection, as this Commission has consistently observed. It is true the FCC may be considering a change to these rules. If the rules do change then the changes will have only prospective effect. @ Communications' petition deals with a current dispute under the current rules, and the decision in *Compensation NPRM* therefore cannot and will not determine the result of the instant dispute.

Verizon suggests that the petition should be dismissed because a substantial portion of the traffic in issue will be dial-up calls to Internet Service Providers and the Part 51 rules therefore do not apply. BellSouth and Sprint, on the other hand, claim only the state has jurisdiction. The fact that the Commission has asserted exclusive jurisdiction over ISP traffic under § 201 of the Act provides more, not less, justification for resolution by the FCC. The ILECs' simultaneous suggestion that the state must, but cannot, resolve the matter is disingenuous. In any event, the interconnection will handle both ISP traffic and traditional voice traffic and the same transport cost rules apply to each. @ Communications requests that the Commission promptly resolve the cost transport cost responsibility.

Sprint has now held up competitive entry by @ Communications for over a year. Such delay is unconscionable and antithetic to the goals of the Act. The Commission should expeditiously grant the request for Declaratory Ruling regarding the meaning and effect of the current rules.

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TO THE COMMISSION:

@ Communications, Inc. ("@ Communications") filed its request for Declaratory Ruling on January 9, 2002. The Commission sought public comment in a public notice dated January 18, 2002. Seven parties submitted comments. @ Communications now respectfully submits these Reply Comments.

Introduction

The issue is simple: do the Commission's rules mean what they say?

47 C.F.R. 51.305(a)(2) indicates that:

> An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:
> ...
> (2) At any technically feasible point within the incumbent LEC's network including, at a minimum:
> ...
> (iii) The trunk interconnection points for a tandem switch.[1]

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[1] @ Communications originally sought a single point of interconnection with Sprint, but subsequently offered to connect at each of Sprint's tandems as is allowed by 51.305(a)(2)(iii). This expressly required interconnection option cannot be fairly characterized as "technically feasible but expensive." Sprint's cost burden for traffic it originates will be only between its originating end offices and the tandem each end office subtends. This case therefore does not present the parade of horribles imagined by Bell South or Verizon in their comments. Indeed, what it does contemplate is that which Verizon has voluntarily offered to CLECs in Pennsylvania. See below.

47 C.F.R. § 51.703(b) provides:

> A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.

47 C.F.R. § 51.709(b) states:

> (b) The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

The FCC discussed 51.709(b) in the *Local Competition Order*[2]:

> 1062. Finally, in establishing the rates for transmission facilities that are dedicated to the transmission of traffic between two networks, state commissions should be guided by the default price level we are adopting for the unbundled element of dedicated transport. For such dedicated transport, we can envision several scenarios involving a local carrier that provides transmission facilities (the "providing carrier") and another local carrier with which it interconnects (the "interconnecting carrier"). The amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility. For example, if the providing carrier provides one-way trunks that the interconnecting carrier uses exclusively for sending terminating traffic to the providing carrier, then the interconnecting carrier is to pay the providing carrier a rate that recovers the full forward-looking economic cost of those trunks. The interconnecting carrier, however, should not be required to pay the providing carrier for one-way trunks in the opposite direction, which the providing carrier owns and uses to send its own traffic to the interconnecting carrier. Under an alternative scenario, if the providing carrier provides two-way trunks between its network and the interconnecting carrier's network, then the interconnecting carrier should not have to pay the providing carrier a rate that recovers the full cost of those trunks. These two-way trunks are used by the providing carrier to send terminating traffic to the interconnecting carrier, as well as by the interconnecting carrier to send terminating traffic to the providing carrier. Rather, the interconnecting carrier shall pay the providing carrier a rate that reflects only the proportion of the trunk capacity that the interconnecting carrier uses to send

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2 In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd. 15499 (1996) (*Local Competition Order*).

terminating traffic to the providing carrier. This proportion may be measured either based on the total flow of traffic over the trunks, or based on the flow of traffic during peak periods. Carriers operating under arrangements which do not comport with the principles we have set forth above, shall be entitled to convert such arrangements so that each carrier is only paying for the transport of traffic it originates, as of the effective date of this order.

The Commission has interpreted each of these rules in several cases,[3] and described their effect in the *Compensation NPRM*, where the FCC is considering possible **prospective** changes to them.[4] In each instance, the FCC clearly, concisely and without hesitation or qualification held that the **current** rules allow a CLEC to select the point(s) of interconnection in an ILEC's territory, that the ILEC has the duty to deliver traffic to the POI and bears cost responsibility for transporting traffic to the POI. The FCC has consistently held that ILECs cannot charge connecting carriers for traffic that originates on the ILEC's network,[5] and that this rule applies to dedicated transport. @ Communications discussed

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[3] *See, e.g*, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, 16045 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (*CompTel*), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utils. Bd.*), *aff'd in part and rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Notice Of Proposed Rulemaking*, ¶¶ 72, 112-114 (Rel. April 27, 2001) ("*Compensation NPRM*"); In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, *Order on Remand and Report and Order*, note 149 (Rel. April 27, 2001) (*ISP Remand Order*); In the Matter of Application by SBC Communications, *et al* to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65, *Memorandum Opinion and Order*, FCC 00-238 at ¶ 78 (Rel. June 30, 2000); In the Matters of TSR Wireless, LLC, *et al.*, v. U S West Communications, Inc., *et al.*, FCC 00-194, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, *Memorandum Opinion And Order*, 15 FCC Rcd. 11166, ¶¶ 25, 31 (Rel. June 21, 2000). *aff'd sub nom. Qwest v. FCC*, 252 F.3d 462 (D.C. Cir., 2001). *See also*, cases cited by AT&T in notes 7-9, 12 and 14; cases cited by Cablevision Lightpath in notes 7-9 and 15.

[4] As discussed below, the fact that the rule is under consideration for change some time in the future provides no justification for refusing to enforce the present rules now. The ILECs' theory would allow them to refuse to provision any UNEs now because the Commission is considering possible changes to the entire list of UNEs as part of triennial review. @ Communications seeks a declaration of the meaning of the current rules because of a current dispute. The decision in the *Compensation NPRM* can have only prospective effect, and will therefore not resolve the current dispute.

[5] BellSouth asserts that the *TSR Wireless* decision is not applicable, and has been undercut in any event by other recent FCC holdings. BellSouth Comments at 7. To the contrary. *TSR Wireless* involves the same

these decisions in its Petition[6] as did the other competitive carriers in their comments. The rule is clear, as the Commission itself stated in the *Compensation NPRM* and *ISP Remand Order* that were issued the same day:

> Note 149 to the *ISP Remand Order* explained that:
>
> This interim regime affects only the intercarrier *compensation* (*i.e.*, the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under our Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, <u>such as obligations to transport traffic to points of interconnection</u>." (emphasis added)

The Commission asks for comment in the *Compensation NPRM* on whether it should retain the single IP rule and whether it should amend its existing rules requiring the ILEC to bear its own transport costs up to the IP in the event that a CLEC picks a IP outside of the ILEC's "local calling area." The request for comment on whether the rules should be changed clearly indicates that the existing rules require the ILEC to bear cost responsibility to the IP.[7]

The incumbent LECs, however, insist that somehow "duty to deliver to the POI" means "option to refuse to deliver to a POI we don't like" and "cannot charge" really means "can charge." The FCC must, once again, explain the meaning and effect of the current rules because the incumbents somehow just don't seem to "get it" that they may not shift the cost of facilities that carry traffic originated by them to an interconnecting CLEC.

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rules. The recent decisions cited by BellSouth each expressly upheld the basic holdings in *TSR Wireless* and were mere applications of them.

6 @ Communications' Petition pages 3, 11-16.

7 Id. at ¶¶ 72, 112-114. The request is phrased in terms of whether the ILEC should bear its costs, but it is clear that the Commission understood that the current rules do impose cost responsibility on the ILEC, as the FCC reiterated in note 149 of the *ISP Remand Order* issued the same day.

More discussion seems superfluous, but sadly, is necessary to completely refute the ILECs' tired claims. @ Communications will first address the assertions made by the ILEC commentors generally, including Sprint. Sprint's individual objections are rebutted next, followed by concluding remarks.

<u>The *Compensation NPRM* will not resolve this matter, and the Commission cannot and should not refuse to interpret current rules merely because it is considering a prospective change to them.</u>

Sprint, Verizon and BellSouth each indicate that this case should be dismissed or deferred because the cost of transport and single POI rules are under consideration for change in the *Compensation NPRM*.[8] The NPRM, however, is a proposal to change the current rules. Any rule changes adopted in that proceeding can operate only in a prospective fashion. @ Communications' request for declaratory ruling pertains to the rules as they currently exist. The Commission's *Compensation NPRM* decision cannot resolve the current dispute, since it involves a present dispute under the current rules.

The ILECs suggest that the Commission should not interpret or enforce a current rule if that rule may be changed in the future. That proposition cannot be even seriously considered. The FCC has promised to review each of its UNE rules on a regular basis[9] and will routinely seek comment on whether any of them should be eliminated in each triennial review. The ILECs' argument, if sustained, would allow them to refuse to provide access to an existing UNE merely because that UNE may be eliminated in the future.

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8 Verizon Comments, page 2; Bell south Comments, page 2; Sprint Opposition, pages 2, 6.

9 The Commission released the NPRM in the first triennial review in Docket 01-338 (FCC 01-361) on December 20, 2001.

The Part 51 rules equally apply to ISP traffic, although the compensation rate for per call compensation may be different

The ILECs demonstrate a remarkable amount of schizophrenia about the rules attendant to intercarrier traffic that is ISP-bound. Verizon, for example, suggests that @ Communications petition should be dismissed because calls to ISPs are "not local in nature and therefore, not subject to the Commission's rules for local interconnection…"[10] On the other hand, Verizon has been very busy recently filing complaints against CLECs in Maryland (and probably other states) asserting that the state commission must impose amendments to existing "local" interconnection agreements to reflect the *ISP Remand Order*.[11] Verizon's claims in this case are hopelessly inconsistent with its actions before state regulators.

It is correct, of course, that in the *ISP Remand Order* the Commission found that § 201 of the Act, as opposed to § 251(b)(5), governs compensation for jointly-provided "information access" As noted above, however, the Commission, however, expressly indicated in note 149 that the interim compensation regime promulgated in that order "does not alter carriers' other obligations under out Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection." (emphasis added) The only fair conclusion is that the ILECs' transport cost obligation does not vary depending on whether a call is "voice" or "Internet." This is sensible given that the Commission also found that there are no inherent cost differences between a voice call and an "Internet" call.[12]

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10 Verizon Comments, page 3.

11 See attachment 1 (Maryland PSC Order).

12 *ISP Remand Order* ¶ 90.

The fact that this Commission has asserted jurisdiction over ISP traffic to the exclusion of the states provides more, not less, justification for this Commission to resolve the matter before it in the instant case.[13] BellSouth and Sprint assert that the FCC should not address the question because it is best left to the North Carolina commission. State commissions, however, have no jurisdiction over § 201 matters. In any event, the North Carolina commission expressly suggested clarification by the FCC on the transport cost issue, and abated a complaint brought by @ Communications so that this proceeding could be brought. *See* attachment 2 (NCUC Abatement Order in @ Communications state complaint against Sprint). @ Communications cannot be reasonably subject to an endless loop of shuffling between state and federal regulators that will not render a decision because each claims the other is better fit to decide the question.

<u>Interconnection at the tandem is not "technically feasible but expensive"</u>

Based on a misreading of ¶ 199 of the *Local Competition Order*, Verizon and Bell South assert that ILECs may shift transport cost responsibility if the CLEC's preferred interconnection is "technically feasible but expensive."[14] There are two reasons why ILECs should not be able to use this isolated passage in the *Local Competition Order* to justify their anticompetitive and unreasonable refusal to abide by the specific terms of the rules. First, the FCC was not referring to transport costs in the cited discussion. Second, @ Communications is not seeking a non-standard and "expensive" form of interconnection. @ Communications is attempting to interconnect at Sprint's tandems, as is expressly contemplated by 51.305(a)(2)(iii).

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13 @ Communications invoked § 201 in addition to the Part 51 rules arising under §§ 251 and 252. Petition at note 2.

14 Verizon Comments, page 2.

The Commission was not referring to transport costs when it authorized charges for a "technically feasible but expensive" form of interconnection. The discussion appears in the last sentence in ¶ 199 of the *Local Competition Order*. The Commission was addressing whether economic concerns were a legitimate consideration factor under the obligation to interconnect stated in § 251(c)(2)(B). The FCC concluded that economic concerns were not relevant to determining technical feasibility. The Commission then went on to indicate that CLECs were responsible for the reasonable costs of an interconnection that was "technically feasible but expensive." At no point in the entire discussion did the Commission mention transport costs; the economic concerns revolved around potential necessary modifications <u>at</u> the proposed point of interconnection.

Transport is not relevant to the discussion for another reason: "Interconnection" refers only to the physical linking of the two networks. *Local Competition Order* ¶ 176; 47 C.F.R. § 51.5 (Definitions). The Commission has taken pains to distinguish between the two. The discussion in ¶ 199 pertained only to interconnection, not transport, which is covered by different statutory provisions and other rules. The ILECs are attempting to shift transport cost responsibility, not recover costs related to "technically feasible but expensive" "interconnection."

In any event, @ Communications is not seeking a "technically feasible but expensive" form of interconnection. Access at the ILEC tandem is expressly authorized in 51.305(a)(2)(iii) and was common even in 1996. *See, Local Competition Order* ¶ 211. There is no hint in the discussion of tandem interconnection that the Commission considered the location of the POI at the tandem to be "expensive." The ILECs' attempt to shift transport cost responsibility based on ¶ 199 fails to withstand scrutiny.

The relationship of the POI to local calling scopes has no bearing on cost responsibility

The ILECs make much of the fact that, for some traffic, the ILEC must transport a call outside of a local calling area to hand it off at the CLEC-selected POI.[15] Bell South claims that it is generally entitled to assess a toll for this "service."[16] The incumbents therefore justify assessing additional charges on the CLEC for this "toll" service. They are wrong.

This case is not about intraLATA toll or jointly provided access for traffic that is interexchange. The dispute relates to a call from one NXX to another NXX in the same rate center. Sprint will hand the call off to @ Communications, who will provide the transport necessary to deliver the call to its customer. These are not long distance calls.

As noted, @ Communications intends to interconnect at the tandem.[17] @ Communications' end office will therefore be indistinguishable from every other ILEC end office that subtends or receives tandem functionality from the tandem. The ILECs use the tandem as a tandem, either for all traffic between end offices or for overflow when direct trunks are full.[18] The tandem that serves an ILEC end office is not always located in the local calling area for that end office, and when a call originating out of one end office is destined for termination at another end office in the same local calling area, it quite often is

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15 Bell South Comments, pages 7-8; Sprint Opposition, page 3.

16 Bell South Comments, note 3.

17 @ Communications initially selected a single POI, but made the business decision to instead interconnect at each tandem. While we believe that the current rules require ILECs to bear the cost of transport even in the single POI situation, the force of the ILECs' arguments is considerably reduced given that the POIs are now significantly closer to Sprint's end offices.

18 The current agreement between Sprint and @ Communications requires direct trunking when volumes reach a certain level. There are valid engineering and economic reasons for direct trunking after a particular threshold is reached. The problem with the ILECs' demand is that they require the CLEC to obtain and pay for unnecessary trunking at the outset, long before volumes are sufficient to justify direct trunks. The Commission must recognize the ploy for what it is: an attempt to erect barriers to entry by imposing uneconomic costs that

routed via a tandem. When this occurs, the ILEC does not collect a toll. Bell South is simply incorrect when it claims that @ Communications' request would require the ILECs to do something they do not do for themselves. To the contrary, @ Communications is attempting to merely secure equal treatment, while the ILECs are attempting to discriminate.

The Verizon Pennsylvania 271 Order does not support the ILECs

In contrast to its position in the Verizon-Pennsylvania § 271 case,[19] Sprint now insists that @ Communications must obtain dedicated T1 trunks to each and every exchange without regard to traffic volumes, even if a dedicated trunk makes no sense from an engineering or economic basis. Sprint is attempting to require @ Communications to pay 100% of the cost of transport even though a substantial amount of the traffic flowing over the trunks will be Sprint originated.

Sprint claims that the *Verizon Pennsylvania 271 Order* justifies its position.[20] A review of the underlying materials in the Verizon-Pennsylvania proceeding, however, indicates that Verizon apparently does not in fact require CLECs to either interconnect at every exchange or pay for transport to each exchange. Verizon allows CLECs to interconnect at the tandem, and if the CLEC makes that election, then Verizon will bear the cost of

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are not justified for any reason.

19 Sprint (page 5) and Bell South (page 9) point to the Commission's recent decision in Verizon's Pennsylvania § 271 case. *Memorandum Opinion and Order*, In the Matter of Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc. and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania, CC Docket 01-138, 16 FCC Rcd. 17419 (2001) ("*Verizon Pennsylvania Order*"). The evidence in that case, however, supports @ Communications, not the ILECs. Verizon will transport to the tandem if the CLEC will interconnect at the tandem. Perhaps that is why Verizon did not mention its own case.

20 Sprint seems quite uncomfortable that it must defend its demands to @ Communications. This is quite understandable given the pleadings Sprint filed in the Verizon-Pennsylvania proceeding on this very issue and the comments it filed in the *Compensation NPRM.*

transport to and from every exchange.[21] This is the same general result that @ Communications seeks in this matter.

Reply to Sprint Objection

1. Sprint did not dispute the factual assertions in @ Communications' Petition.

Although Sprint opposes the issuance of a declaratory ruling, this is to be expected. The most significant thing about Sprint's filing, however, is what is missing: Sprint does not contest the factual assertions in the Petition.[22] Sprint **does not deny that it has refused to interconnect with @ Communications unless and until @ Communications agrees with Sprint's demand that @ Communications pay for the cost of transport on Sprint's side of the points of interconnection and to each local calling area**. Sprint does not deny that the underlying agreement between Sprint and MCImetro is still in force. Sprint does not deny that @ Communications' entry has been delayed for more than a year. Sprint has, of course, materially benefited from the delay. The Commission must expeditiously resolve this matter and forcefully remind Sprint and all other ILECs that they will not be allowed to deny and delay competitive entry by insisting on implementation terms that violate the law and are inconsistent with the terms of an interconnection agreement.

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21 *See* attached excerpts of Verizon-Pennsylvania's Reply Declaration of Lacouture and Ruesterholz (Attachment 3) and Sprint's Comments (Attachment 4) in the Verizon-Pennsylvania 271 case. *See especially* Sprint's Comments at page 6, where the difference between interconnection at each tandem and interconnection at the exchange level is noted. The FCC addressed this option in note 345 of the *Verizon Pennsylvania Order*. Verizon will transport to the tandem. Its objection is paying for transport beyond the tandem.

22 Sprint does, of course, deny that it violated the rules.

2. The Enforcement Bureau did not address the merits.

Sprint asserts that the Enforcement Bureau's decision to not accept the matter for accelerated treatment constituted a ruling on the merits.[23] As the Commission knows, this is absolutely untrue. The Enforcement Bureau applied the criteria set out in 47 C.F.R. § 1.730(e)(1-6) and determined in its discretion that the matter was not appropriate for accelerated treatment. While the subsection (4) consideration factor is whether the complainant states a claim for violation of the Act or Commission rules, the Enforcement Bureau did not indicate that @ Communications had not stated a claim. The letter from the Enforcement Bureau expressly provides on its face that the determination "has no bearing on the merits of @ Comm's dispute with Sprint."[24] Sprint's implication is a mischaracterization of the Enforcement Bureau decision.

Sprint itself opposed accelerated treatment. Indeed, Sprint strongly asserted that accelerated treatment was not appropriate because the dispute was better resolved in the context of a declaratory ruling request.[25] Now, however, that @ Communications has done precisely what Sprint suggested, Sprint objects. Sprint's duplicity cannot be rewarded.

2. The Current Interconnection Agreement is Consistent with Part 51.

In a further deception, Sprint asserts that the current agreement between the parties supports its position.[26] To the contrary.

Attachment IV, Interconnection of the Agreement provides, in pertinent part:

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23 Sprint Objection pp. 2-3.

24 See Attachment 5.

25 See attachment 6, page 4 (Sprint's reply to @ Communications' request for accelerated treatment.

26 @ Communications is not seeking enforcement of the agreement in this proceeding. The point is that, contrary to Sprint's assertion, the agreement is consistent with the FCC's rules and @ Communications' position.

1.2 Interconnection Point

1.2.1 "Interconnection Point" or "IP" means the physical point that establishes the technical interface, the test point, and the operational responsibility hand-off between MCIm[27] and Sprint for the local interconnection of their networks.

1.2.2 MCIm shall designate at least one (1) physical IP in the LATA (of which one (1) IP shall be a tandem office or from a location which MCIm purchases transport to such tandem office, unless otherwise mutually agreed by the Parties) in which MCIm originates Local Traffic and interconnects with Sprint. MCIm will be responsible for engineering and maintaining its network on its side of the IP. Sprint will be responsible for engineering and maintaining its network on its side of the IP. If and when the Parties choose to interconnect at a mid-span meet, MCI and Sprint will jointly provision the facilities that connect the two (2) networks. Sprint will be required to provide either fifty percent (50%) of the facilities or to its exchange boundaries, whichever is less. MCIm will be required to provide either fifty percent (50%) of the facilities or to its exchange boundaries, whichever is greater.[28]

1.2.2.1 Upon MCIm's request for additional points of interconnection, Sprint will interconnect with MCIm at any Technically Feasible point of MCIm's choosing.

1.2.2.2 Any end office not subtending Sprint's tandem Switch will require provisioning of a separate IP or purchase of transport to an existing IP is (*sic*) such transport is available, by MCI to terminate traffic to such end office.

* * * *

2.4.3 MCIm may choose to establish direct trunking to any given end office. …

* * * *

4.1.4 Trunking can be established to tandems or end offices or a combination of both via either one-way or two-way trunks. Trunking will be at the DS-0 level, DS-1 level, DS-3/OC-3 level or higher, as agreed upon by MCIm and Sprint. Initial

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27 Claimant adopted the North Carolina MCIm – Sprint interconnection agreement.

28 Sprint points to the last sentence in 1.2.2 for support. This dispute, however, does not involve a mid-point meet, which is the subject of the 50%/exchange boundary rule.

> trunking will be established between the MCIm switching centers and Sprint's access tandem(s). The Parties will utilize direct end office trunking under the following conditions:
>
> 4.1.4.1 **Tandem Exhaust.** If a tandem through which the Parities are interconnected is unable to, or is forecasted to be unable to, support additional traffic loads for any period of time, the Parties will mutually agree to an end office trunking plan that will alleviate the tandem capacity shortage and ensure completion of traffic between MCIm and Sprint subscribers.
>
> 4.1.4.2 **Traffic Volume.** The Parties shall install and retain direct end office trunking sufficient to handle actual or reasonably forecast traffic volumes, whichever is greater, between an MCIm switching center and a Sprint end office where the traffic exceeds or is forecast to exceed 220,000 minutes of Local Traffic per month. The Parties will install additional capacity between such points when overflow traffic between the MCIm switching center and Sprint access tandem exceeds or is forecast to exceed 220,000 minutes of Local Traffic per month unless otherwise mutually agreed.
>
> 4.1.4.3 **Mutual Agreement.** The Parties may install direct end office trunking upon mutual agreement in the absence of the conditions set forth in Subsections 4.1.4.1 and 4.1.4.2 above and agreement will not be unreasonably withheld.[29]

Paragraphs 1.2.1 and 1.2.2 clearly divide transport cost responsibility based on the location of the POI. In other words, Sprint "has the <u>obligation to transport traffic to points of interconnection</u>."[30] @ Communications desires to locate the POIs at the tandem as provided by ¶ 1.2.2. The current agreement goes on to provide that direct trunks must be established to a specific end office only under certain conditions, the most significant of which is when traffic volumes reach approximate a DS1. ¶¶ 4.1.4.1 – 4.1.4.3. Sprint, however, is attempting to require @ Communications to establish trunks in every local calling area without regard to

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29 The citation to the agreement is interposed merely to show that the agreement is consistent with the FCC's rules. @ Communications is not here seeking interpretation or enforcement of the agreement.

30 *ISP Remand Order* note 149.

the occurrence of any of the specific triggers in the agreement. Sprint's continued refusal to interconnect unless @ Communications waives the express terms of the agreement are not only a violation of the transport cost rules cited above, but also appear to be a violation of the duty of good faith.[31]

3. The current agreement is still in force.

Sprint claims that the current agreement has expired, and implies it is no longer in force. Not true. As noted, @ Communications exercised its rights under § 252(i) and adopted the agreement between Sprint and MCImetro. The initial term of the @ Communications-Sprint Interconnection Agreement ("the Agreement") expired on or about August 16, 2000. The Agreement continues in force, however, because, (A) the parties are negotiating a replacement agreement and/or (B) on information and belief, the underlying agreement between MCImetro and Sprint is also still in effect.[32] For so long as the underlying agreement remains in effect or unless and until there is a replacement agreement between @ Communications and Sprint, the current agreement remains in effect.

4. There is an important difference between an arbitration award establishing new terms and the interpretation of an existing agreement.

Sprint and BellSouth[33] both point to a series of North Carolina Utilities Commission decisions relating to transport cost responsibility. @ Communications mentioned these

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[31] "We reject the general contention that a request by a party that another party limit its legal remedies as part of a negotiated agreement will in all cases constitute a violation of the duty to negotiate in good faith. A party may voluntarily agree to limit its legal rights or remedies in order to obtain a valuable concession from another party. *In some circumstances, however, a party may violate this statutory provision by demanding that another waive its legal rights.*" *Local Competition Order, supra*, at ¶ 152. (Emphasis added.) No "valuable concession" is at issue here. Sprint simply demands that @ Communications waive its legal rights on the "cost of transport" issue and accept Sprint's preferred resolution of the issue before Sprint will interconnect and exchange traffic.

[32] As noted above, Sprint did not dispute that the underlying agreement is still in effect.

[33] Sprint Objection, page 4; BellSouth Comments, page 3.

decisions in its Petition. There is, however, a critical distinction between a state commission award in a proceeding to establish new agreement terms, and the interpretation or enforcement in an existing agreement. The present dispute arose in the context of an existing agreement. The NCUC decisions, therefore, do not truly inform the debate, if the goal is to divine rights in an existing agreement as opposed to developing new terms in a replacement agreement.[34]

@ Communications certainly does acknowledge that the NCUC did – in the context of arbitrations to establish replacement agreements – hold that ILECs' could shift the cost of transport. The North Carolina commission, however, also indicated that the rules were not absolutely clear, and encouraged the parties in the arbitrations to seek clarification from this Commission. In fact, the NCUC ordered the abeyance of a post interconnection agreement dispute resolution proceeding brought by @ Communications so that @ Communications could bring this very proceeding. The NCUC was aware of the forward-looking *Compensation NPRM*, yet it provided for a declaratory ruling (a decidedly different procedure, because it deals with a present dispute) in the context of the state proceedings that directly led to this Declaratory Ruling case. It appears the NCUC would also appreciate guidance on the issue, and as soon as possible.

@ Communications is not avoiding or evading the lawful jurisdiction of the North Carolina commission, nor is this an attempt to collaterally attack any prior NCUC orders. The NCUC recommended referral of the question to this Commission, and abated the state

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[34] Bell South asserts that @ Communications is attempting a collateral attack on the NCUC decisions. This is wholly incorrect. The cited decisions were arbitrations to establish new terms. @ Communications and Sprint have a disagreement in the context of an existing agreement. In any event, @ Communications was not a party and could not have been a party in the prior arbitrations, and could not have appealed them.

proceeding between @ Communications and Sprint so an answer could be obtained from the FCC.

CONCLUSION

This case is about the existing rules concerning transport cost responsibility. The dispute between @ Communications and Sprint is now in its second year. Sprint insists that @ Communications waive its rights under an existing agreement and the current rules. @ Communications sought relief from the North Carolina commission. The state case was abated in order for @ Communications to seek relief at this Commission. Sprint opposed accelerated resolution and indicated a preference for a declaratory ruling. Sprint now opposes a declaratory ruling and suggests that the matter is best resolved in the *Compensation NPRM*, even though any rule changes resulting from that proceeding will be prospective only and may not occur for some time. Meanwhile, @ Communications faces a refusal to interconnect. This cannot be allowed to continue. The NCUC has deferred to the FCC and this Commission must now resolve the matter, in this case. The ILECs cannot be allowed to ignore the rules and delay competitive entry without sanction.

Under the current rules, ILECs are responsible to deliver traffic to the POI. They cannot charge a CLEC for the facilities associated with traffic originated by the ILEC. @ Communications agreed to establish a POI at each of Sprint's tandems, consistent with the current agreement and as expressly allowed by the Commission's rules. Tandem interconnection is not a "technically feasible but expensive" form of interconnection; indeed that is how Sprint connects its own end offices, and one must assume they did not choose a "expensive" method for its own network. The current transport cost responsibility rules do not have any express or implicit limitation or exception relating to Sprint's local calling areas, and Sprint cannot charge @ Communications for the transport from a local calling area to the tandem.

The FCC must expeditiously issue the requested declaratory ruling and resolve this controversy.

Respectfully submitted,

@ Communications, Inc.

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By: ______________________________
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Attorneys for @ Communications, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Declaratory Ruling has been served on the following by electronic mail and/or by first class U.S. mail, properly addressed with postage prepaid, on this 6th day of March, 2002.

Carolina Telephone and Telegraph Company
Central Telephone Company
14111 Capital Boulevard
Wake Forest, North Carolina 22587-5900

Kathryn L. Feeney
Sprint
5454 West 110th Street
Overland Park, Kansas 66211

Robert Carl Voigt
Senior Attorney
Carolina Telephone and Telegraph Company and
Central Telephone Company
Legal Department – Mailstop NCWKFR0313
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Pete Sywenki
Sprint Corporation
401 9th St., N.W.
Washington, D.C. 20004

W. Scott McCollough

ATTACHMENT 1 TO

@ COMMUNICATIONS' REPLY COMMENTS

STATE OF MARYLAND

PUBLIC SERVICE COMMISSION

February 28, 2002

In the Matter of Petition of Verizon Maryland, Inc. for a Declaratory Ruling and for an Order Approving Amendments to Interconnection Agreements.	* * *	Case No. 8914

To All Parties of Record and Interested Persons:

Enclosed is a copy of Order No. 77578, issued today by the Commission in the above case.

Also enclosed is an Admission of Service form, which we ask that you complete, sign and return to our office.

Very truly yours,

Naomi Miranda
Management Associate

nm

Enclosures

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STATE OF MARYLAND
PUBLIC SERVICE COMMISSION
ORDER NO. 77578

IN THE MATTER OF THE PETITION OF VERIZON MARYLAND, INC. FOR A DECLARATORY RULING AND FOR AN ORDER APPROVING AMENDMENTS TO INTERCONNECTION AGREEMENTS.	* * * *	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND CASE NO. 8914

On August 17, 2001, Verizon Maryland, Inc ("Verizon") filed a Petition for Declaratory Ruling and an Order Approving Amendments to Interconnection Agreements. ("Petition"). In this Petition, Verizon requests that the Commission declare that the new rates for Internet-bound traffic established in the Federal Communications Commission's ("FCC") *Order on Remand*[1] apply as of June 14, 2001. This declaration would only pertain to Verizon's existing interconnection agreements that have change of law provisions.

Verizon also contends that several competitive local exchange carriers ("CLECs") have failed to respond to Verizon's repeated offers to negotiate amendments regarding the FCC's recent Order. Verizon asks that the Commission direct these CLECs to make Verizon's proposed amendment part of their interconnection agreements.

In the *Order on Remand*, the FCC determined that Internet-bound traffic is a form of interstate access traffic that is not subject to the reciprocal compensation obligations of the Telecommunications Act of 1996 ("1996 Act"). *Id.* ¶¶ 30, 39, 42-47. For carriers not already exchanging such traffic or not entitled to compensation for such traffic under the

[1] Order on Remand and Report and Order, *Intercarrier Compensation for ISP-Bound Traffic*, cc Docket Nos. 96-98, 99-68, FCC 01-131 (rel. April 27, 2001) ("*Order on Remand*"). The FCC's *Order on Remand* established a new reciprocal compensation structure for Internet-bound calls.

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terms of their interconnection agreements, the FCC ordered that the "bill and keep" compensation system must apply as of the *Order on Remand's* effective date. *Id.* ¶ 81. For carriers entitled to payment for Internet-bound traffic under their agreements prior to the effective date of the new rules, the FCC stated that the new rate regime should be implemented through contractual change-of-law provisions. *Id.* ¶ 82.

Verizon argues that when an interconnection agreement provides for modification of its terms and conditions to reflect changes in applicable law, such modifications are effective as of the effective date of those changes in law.[2] Verizon also argues that applying the FCC rates as of the effective date of the *Order on Remand* under the change-of-law provisions in interconnection agreements is consistent with past practice in Maryland. According to Verizon, a number of competitive local exchange carriers ("CLECs") are refusing to negotiate the required amendment or deliberately dragging out negotiations.

Several CLECs responded to Verizon's Petition.[3] For example, WorldCom, Inc. ("WorldCom")[4] disputes Verizon's contention that it is not negotiating in good faith. WorldCom also claims that any negotiated amendment would not go into effect until that amendment is approved by the Commission rather than becoming effective on the date of the *Order on Remand* as argued by Verizon. WorldCom also argues that the change of law provision in its interconnection agreement with Verizon is not invoked by the *Order on Remand*. WorldCom also requested that the Commission sanction Verizon for withholding

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[2] Petition at page 5.

[3] CLECs filing a response include WorldCom, Inc. and Allegiance Telecom of Maryland, Inc. Joint comments were filed by the Competitive Telecommunications Association, Core Communications, Inc., e.spire Communications, Inc., KMC Telecom Holdings, Inc., SniP Link LLC and XO Communications. ("Joint CLEC Parties").

[4] WorldCom filed on behalf of MCImetro Access Transmission Services LLC and MCI WorldCom Communications (formerly MFS Intelenet of Maryland).

reciprocal compensation payments. WorldCom asks that the Commission require Verizon to remit withheld payments and to cease and desist withholding such payments. WorldCom also requests that the Commission impose a fine on Verizon of $25,000 per day.

The Commission Staff ("Staff") also filed a response to Verizon's Petition. Staff recommends that the Commission deny Verizon's request and order Verizon to negotiate amendments to its interconnection agreements to reflect the new rates for Internet-bound traffic. According to Staff, the new rates would become effective upon approval of the Commission or upon the negotiated effective date.

Specifically, Staff recommends dismissal of Verizon's Petition because the claims are too individualized to issue such a ruling. The Staff noted that the interconnection agreements have different change of contract provisions, which may require different orders. Staff expressly notes that merely having a provision called a change of law provision may be insufficient to grant the relief Verizon requests in its Petition. Staff also disagreed with Verizon's analysis of the effective date. According to Staff, if the effective date of a negotiated amendment was required to be the same as the effective date of the *Order on Remand*, the FCC would have stated so expressly.

In its Reply, Verizon contends that its central legal premise has not been challenged by the CLECs. This premise is that the FCC's new rate regime should apply as of June 14, 2001 because the terms of the agreements, including the change-of-law provisions, evidence the parties intent to conform their agreements and conduct to changes in law. Verizon also claims that the CLECS do not dispute their obligation to negotiate amendments in a timely manner and in good faith. According to Verizon, in light of their failure to meet this obligation, the FCC's new rates should apply as of June 14, 2001. Verizon also argues that the CLECs do not dispute that applying the FCC's new rates as of June 14, 2001 is consistent with past practice in Maryland and industry norms. Finally, according to Verizon, the CLEC's failed to respond to Verizon's argument that delaying the implementation date will create serious harm to competition.

DISCUSSION

On April 27, 2001, the FCC released its *Order on Remand* establishing a new rate regime for Internet Service Provider (ISP) traffic. The FCC declared that ISP-bound traffic constitutes "information access" and thus is not subject to the reciprocal compensation requirement of §251 (b)(5) of the 1996 Act. The FCC concluded that it has the authority under Section 201 of the 1996 Act to regulate ISP-bound calls and to establish inter-carrier compensation rules for such calls.

Under the FCC plan, reciprocal compensation rates for ISP-bound traffic are subject to declining rate caps over a 36-month period. Traffic exceeding a three-to-one ratio of terminating to originating traffic is presumed, unless proven otherwise, to be ISP-bound traffic subject to the FCC's rate structure. After the 36-month period, bill-and-keep compensation would apply to such traffic instead of reciprocal compensation.

While the new rate regime went into effect on June 14, 2001 for carriers entering into new or renegotiated interconnection agreements, the FCC clearly envisioned prospective application of the new rates for existing interconnection agreements. The FCC stated:

> "The interim compensation regime we establish here applies as carriers renegotiate expired or expiring

> interconnection agreements. It does not alter existing contractual obligation, except to the extent that parties are entitled to invoke contractual change-of-law provisions. This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here."[5]

The conclusion that the FCC expected only prospective application of the *Order on Remand* is further supported by the FCC's statement that "as of the date this Order is published in the Federal Register, carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic."[6] If the *Order on Remand* automatically became effective for all interconnection agreements as of June 14, 2001, the FCC would not have found it necessary to place this restriction on the opt in provision. Carriers opting in after June 14, would have also opted in to the FCC's new ISP rate regime.

Thus, the *Order on Remand* clearly is not self-executing for existing interconnection agreements. Instead, the FCC provides that its interim compensation regime will apply prospectively as carriers renegotiate such agreements. The FCC *Order on Remand* also provides that a party may change the terms of an existing agreement if permitted to do so by a change-of-law provision. The FCC was not directing that agreements be amended pursuant to change-of-law provisions, the agency merely recognized that some agreements may have applicable change-of-law provisions. While individual change-of-law provisions may provide that an agreement shall be deemed to have been amended automatically if the law changes, this is not necessarily the case in every instance.

[5] *Order on Remand*, ¶ 82.
[6] *Id.* at ¶ 82.

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Thus, Verizon's argument that declaring the FCC's new rates apply as of the effective date of the *Order on Remand* is consistent with controlling legal authority and sound public policy is simply erroneous. The FCC has determined otherwise and found that this aspect of its rate regime should be prospective only. This Commission cannot reach a contrary determination. If Verizon does not agree with the prospective nature of the FCC *Order on Remand*, its only recourse is to petition the FCC or the courts.

Verizon also asks this Commission to order those CLECs who have refused or delayed negotiating an amendment to the interconnection agreement to adopt Verizon's proposed amendment. The Commission is becoming increasingly concerned with the amount of time and resources it is forced to expend on this one issue. However, in this instance, the Commission agrees with Staff that the claims are too individualized for such a generic ruling. Interconnection agreements contain differing change of law contract provisions. The specific wording of each change of law contract provision may require the Commission to reach a different result. Furthermore, Verizon's request appears to be based, in part, on allegations that the carriers have not negotiated in good faith. However, the question of whether an individual carrier has negotiated in good faith is a factual determination which cannot be made in the context of a declaratory ruling.

The Commission finds that the issue of reciprocal compensation for ISP calls has dragged on far too long. In an effort to expedite this matter and hopefully achieve a final resolution, all CLECs listed in Exhibit 9 of Verizon's Request for Declaratory Ruling (Attachment A) are directed to respond to Verizon's proposed amendment within seven days of the issuance of this Order. This response shall take the form of either (1) a declaration that the issue has been resolved and thus no further action is necessary; (2)

acceptance of the Verizon amendment; (3) proposed alternative language with an explanation regarding why this alternative should be adopted by the Commission; or (4) an explanation of why no amendment is necessary or appropriate given the specific language of the individual interconnection agreement. The Commission expects that these filings will be limited to the issues set forth above.

Verizon shall have seven days to respond to the CLEC filings. After receipt of these filings, the Commission shall determine what proceedings, if any, are necessary to resolve the individual issues expeditiously.

Finally, the Commission must address WorldCom's request that Verizon be sanctioned for withholding reciprocal compensation payments. The Commission denies this request. It is inappropriate to consider a request for sanctions, which requires evidentiary support, within the context of a Declaratory Ruling. Furthermore, WorldCom requested that Verizon be fined $25,000 per day for this alleged violation. However, the Commission's fining authority is limited to penalties of $10,000 per day.

IT IS, THEREFORE, this 28th day of February, in the year Two-Thousand and Two, by the Public Service Commission of Maryland,

ORDERED: (1) That Verizon Maryland, Inc's request that the Public Service Commission declare that the new rates established in the Federal Communications Commission's *Order on Remand* apply as of the effective date of that Order is denied;

(2) That Verizon Maryland, Inc's request that the Public Service Commission order those competitive local exchange carriers listed in Exhibit 9 to adopt Verizon's proposed amendment is denied;

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(3) That all carriers listed in Exhibit 9 shall respond to Verizon's proposed amendment within seven days of the issuance of this Order;

(4) Verizon shall have seven days to respond to the carriers filings; and

(5) WorldCom, Inc's request for sanctions is denied.

By Direction of the Commission,

Felecia L. Greer
Executive Secretary

PETITION FOR DECLARATORY RULING OF VERIZON MARYLAND INC.

EXHIBIT 9

CLECs which have failed to respond.

EXHIBIT 9

ICG Telecom Group Inc.
Interactive Communications, Inc.
Intermedia Communications, Inc.
International Telephone Group, Inc.
Interpath Communications, Inc.
Jato Operating Two Corp.
Jerry LaQuiere
Jones Telecommunications of Maryland, Inc., d/b/a Comcast Communications of Maryland, Inc.
JTC Communications, Inc.
LCI International Telecom Corp.
LightWave Communications, LLC
Lightyear Communications Inc.
Massachusetts Local Telephone Company, Inc.
Max-Tel Communications, Inc.
Megatel Corporation
Metromedia Fiber Network Services, Inc.
MVX.Com Communications, Inc.
Netel, Inc. d/b/a Tel3
Net-Tel Corporation
Network Plus, Inc.
New Edge Network, Inc.
New Frontiers Telecommunications
North American Telecommunications Corporation
North American Telephone and Telecommunications, Inc.
NOS Communications Inc.
Ntegrity Telecontent Services Inc.
Nustar Communications Corp.
NuStar Telephone Company Inc.
OMC Communications Inc.
Optimum Global Communications, Inc. d/b/a Local Phone Company
Pathnet Operating, Inc.
Phone Reconnect of America, LLC
Phone-Link, Inc.
Picus Communications LLC
Plan B Communications, Inc.
Preferred Carrier Services, Inc. d/b/a Phone for All (Spanish) Telefonos Para Todos
Quality Telephone, Inc.
Quantum Telecommunications, Inc.
ReFlex Communications, Inc.
Rhythms Links Inc.
ServiSense.com Inc.
Starpower Communications LLC
Talk Time Communications Ltd.
Talk.Com
Tekbilt World Communications Inc.
TeleServices Group, Inc. f/k/a COMAV

EXHIBIT 9

Transbeam
Trucom Corporation
United States Telecommunications, LLC d/b/a Tel Com Plus
US Mobile Services Inc.
US WATS Inc
US West Interprise America Inc
USA eXchange, LLC d/b/a Omniplex Communications Group
USN Communications Atlantic Incorporated
VDL Incorporated d/b/a Global Telecom Brokers
VIC-RMTS-DC, LLC d/b/a Verizon Avenue
We Connect Communications Inc.
xDSL Networks Inc.